

STATEMENT OF EMERGENCY

31 KAR 5:025E

This emergency administrative regulation is necessary following the General Assembly's passage of House Bill 574 in the 2021 regular legislative session, enacted in Kentucky Acts Chapter 197, effective June 29, 2021. The Kentucky Constitution requires free and fair elections; Chapter 197 mandates that the State Board of Elections promulgate certain new administrative regulations to help ensure that this requirement is met. Though there are no regularly scheduled elections in 2021, a special election could be required at any time after the effective date of June 29, 2021. This administrative regulation is being filed on an emergency basis pursuant to KRS 13A.190(1)(a)(3) in order to guarantee that should a special election become necessary after June 29, 2021, the new administrative regulations required by Chapter 197 are in place. This emergency administrative regulation is temporary in nature will be replaced by an ordinary administrative regulation as the regulations required under Chapter 197 will be statutorily required in perpetuity, absent any further action from the General Assembly. The companion ordinary administrative regulation is identical to this emergency administrative regulation.

ANDY BESHEAR, Governor
JARED DEARING, Director

STATE BOARD OF ELECTIONS **(New Emergency Administrative Regulation)**

31 KAR 5:025E. Ballot standards and election security.

EFFECTIVE: June 23, 2021

RELATES TO: KRS 117.001, 117.085, 117.086, 117.087, 117.145, 117.225, 117.228

STATUTORY AUTHORITY: KRS 117.015(1)(a)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 117.015(1)(a) authorizes the State Board of Elections to promulgate administrative regulations necessary to properly carry out its duties. Several Kentucky Revised Statutes require the State Board of Elections to promulgate administrative regulations that provide for measures that establish standards for the ballots used during elections, as well as, measures that ensure that votes cast during an election are done so in a free, fair, and secure manner. This administrative regulation provides for those measures.

Section 1. In addition to the requirements for printed ballots outlined in KRS 117.145, ballots caused to be printed by the county clerk of each county shall meet quality and size standards specific to the voting systems certified by both the State Board of Elections and the United States Election Assistance Commission.

Section 2. The outer envelope of all mail-in absentee ballots shall bear a barcode or other label that is unique to the individual voter and capable of being read by an electronic optical scanner. The unique barcode or label for each mail-in absentee ballot outer envelope shall be issued by the State Board of Elections.

Section 3. Upon the time of certification of each candidate and each question to be voted upon, all printed paper ballots shall be secured by the county clerk of each county, under lock and key, in an area under the direct control of the county clerk and approved by the county

board of elections. The possession of all printed ballots shall be accounted for on SBE Form 76, "Ballot Accountability Statement." Upon the need for paper ballots to be printed at a county clerk's office, an accounting of the printed ballots shall be made on either the SBE Form 76, "Ballot Accountability Statement" or by the printing equipment. Upon the transfer of ballots from the area under the direct control of the county clerk to a polling location, the transfer shall be noted on the SBE Form 76, "Ballot Accountability Statement." Beginning with the casting of ballots during the period described in KRS 117.085(2), each voted ballot shall remain in a locked and sealed receptacle, until the conclusion of the period described in KRS 117.295(1). At the conclusion of each day of voting, an accounting of the number of all voted, unvoted, and spoiled ballots shall be recorded on the SBE Form 76, "Ballot Accountability Statement." All ballots and election materials not secured in an area under the direct control of the county clerk after the close of polls shall be secured on location by the county sheriff, in coordination with the county board of elections, from the time described in KRS 117.085(2) until the conclusion of voting on the day of an election. As mail-in absentee ballots are received by county clerks, they shall have their unique barcode or label scanned. Upon each mail-in absentee ballot being processed, the unique barcode or label shall be scanned again. If a mail-in absentee ballot is found to be without the need for a signature cure, or a mail-in absentee ballot has been returned along with a completed SBE Form 77, "Missing or Discrepant Mail-in Absentee Signature," the ballot shall be recorded into an optical scanner, to be deposited in a locked and sealed receptacle for the period described in KRS 117.295(1). Any completed SBE Form 76, "Ballot Accountability Statement" shall be turned over to the Commonwealth's Attorney along with any other materials required under KRS 117.365.

Section 4. Any voter who is disabled may request a mail-in absentee ballot via an online accessible ballot portal which shall conform to web accessible design standards as set forth by the W3C Web Accessibility Initiative.

Section 5. Upon receipt of a valid mail-in ballot request, through the online request portal or other valid request method, the request of the voter shall be noted in the Voter Registration System, and reflected in the electronic pollbooks used by precinct election officers. Should a voter noted to have requested a mail-in absentee ballot appear at a polling location in order to vote in-person, the precinct election officer shall communicate with the county clerk, who shall make a determination as to whether the requested mail-in absentee ballot has been completed and returned as a cast ballot by the voter. If the mail-in absentee ballot is found to have been completed and returned as a cast ballot, the voter shall not be permitted to cast an in-person vote. If the mail-in absentee ballot is found not to have been completed and returned as a cast ballot and the ballot has been returned to the county clerk no later than seven (7) days prior to the date of the election as required by KRS 117.085(11), the county clerk shall immediately cancel the issued ballot in the Voter Registration System and allow the voter to cast an in-person ballot after the voter completes Form SBE 32, "Oath of Voter," copies of which shall be forwarded to the Commonwealth's Attorney.

Section 6. A voter, or an individual identified by KRS 117.0861(1), may deliver a mail-in absentee ballot to the office of the county clerk in the county where the voter is registered, or to a secure drop-off location if one is maintained by the county clerk in the county where the voter is registered, rather than mailing the ballot via the United States Postal Service. Any county choosing to use a receptacle for ballot drop-off other than a drop-box provided by the State Board of Elections, must formally seek the State Board of Elections' approval of the receptacle before any ballot shall be allowed to be deposited inside. Any county choosing to utilize a drop-

off receptacle, including those provided by the State Board of Elections, shall inform the State Board of Elections of the number of receptacles being used, the type of each receptacle being used, and the location of each drop-off location. Any receptacle located outside a County Clerk's Office shall be placed in a well-lit, easily accessible location, be bolted down, and be under video surveillance at all times. Any drop-box located inside, shall be under direct supervision of the staff of the county clerk at all times that it is accessible to the public. All drop-boxes used for the receipt of ballots shall be clearly marked as for use by voters in the election, so as to differentiate the drop-box from any other that may be in use in the area. Any other non-elections related drop-box in use by a county clerk for any other official business shall clearly indicate that the other drop-box is not for the return of election material. Each county clerk utilizing one or more ballot drop-off receptacle shall empty each receptacle at least once each business day of the county clerk's office, and secure the absentee ballots therein in a manner consistent with KRS 117.086(7); however, county clerks shall empty receptacles more frequently than daily, as needed, so as to reasonably accommodate the volume of voter-delivered absentee ballots.

Section 7. After the receipt of a mail-in absentee ballot by the county clerk and the examination of the signatures located on the outer envelope and the detachable flap, as well as, the voter's signature of record, if a signature match cannot be made, the county board of elections, central counting board, or the county clerk shall make a reasonable effort to contact the voter, which shall, at minimum, include the mailing of Form SBE 77, "Missing or Discrepant Mail-in Absentee Signature," to provide notice to the voter that they may cure their signature before the closing of the polls on the day of the election. Upon the county board of elections, central counting board, or the county clerk noting the need for a signature cure, the ballot shall be noted in the Voter Registration System, which shall prompt the facilitation of the printing of the SBE 77. The State Board of Elections shall facilitate the printing of the SBE 77 on behalf of the counties with a state-approved vendor, the cost of which shall be borne by the county required to contact the voter.

Section 8. A voter unable to provide proof of identification as required under KRS 117.225, and as defined under KRS 117.001, shall meet the requirements of KRS 117.228(1)(c) by executing SBE Form 71, "Voter Affirmation Form." A voter personally known to an election officer may cast a ballot in accordance with KRS 117.228(4) upon the election officer executing SBE Form 72, "Election Officer Affirmation Form." Both the SBE 71 and SBE 72 shall be forwarded to the Commonwealth's Attorney following the election.

Section 9. Incorporated by Reference. (1) The following material is incorporated by reference:

- (a) "Oath of Voter," SBE Form 32, 06/2021;
- (b) "Ballot Accountability Statement," Form SBE 76, 06/2021;
- (c) "Missing or Discrepant Mail-in Absentee Signature," Form SBE 77, 06/2021;
- (d) "Voter Affirmation Form," Form SBE 71, 06/2021;
- (e) "Election Officer Affirmation Form" Form 72, 06/2021;

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the State Board of Elections, 140 Walnut Street, Frankfort, Kentucky Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m.

JARED DEARING, Executive Director

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this temporary emergency administrative regulation shall be held on August 31, 2021, at 10:00 a.m. ET, at the Office of the State Board of Elections. Individuals interested in being heard at this hearing shall notify this agency in writing by five (5) workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing was received by that date, the hearing may be cancelled. This hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted until August 31, 2021. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Taylor Brown, 140 Walnut Street, Frankfort, Kentucky 40601, phone (502) 782-9499, email TaylorA.Brown@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Taylor Brown

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation establishes standards for the ballots used during elections, as well as, measures that ensure that votes cast during an election are done so in a free, fair, and secure manner.

(b) The necessity of this administrative regulation: This administrative regulation is necessary given that Kentucky Acts Chapter 197 requires the State Board to promulgate new administrative regulations.

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 117.015(1)(a) authorizes the State Board of Elections to promulgate administrative regulations necessary to properly carry out its duties.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation fulfills the mandates of several of the Kentucky Revised Statutes amended by Kentucky Acts Chapter 197.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation:

(b) The necessity of the amendment to this administrative regulation:

(c) How the amendment conforms to the content of the authorizing statutes:

(d) How the amendment will assist in the effective administration of the statutes: This is a new administrative regulation.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This administrative regulation will affect voters of the Commonwealth, county clerks, and the State Board of Elections.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment. To comply with this administrative regulation, voters may need to complete a form or follow absentee ballot delivery instructions, while county clerks and the State Board of Elections will need to take steps to ensure the security of their elections.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): The State Board of Elections estimates that the implementation of this administrative regulation will have minimal costs.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Compliance with this new administrative regulation will benefit all in ensuring that all elections conducted in the Commonwealth are done so in a free, fair, and secure manner.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: The cost of the implementation of this administrative regulation for the State Board of Elections will be minimal as it will require only the creation of the new Forms incorporated by reference.

(b) On a continuing basis: The only continuing cost will be the price associated with printing any copies of the SBE Forms that are necessary.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Funds from the State Board of Elections' administrative budget will be used in the implementation and enforcement of this administrative regulation.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: Implementation of this administrative regulation can be achieved without an increase in fees or funding by the General Assembly.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: No fees are associated with this administrative regulation.

(9) TIERING: Is tiering applied? Tiering is not used in this administrative regulation, as a desired result of the promulgation of this administrative regulation is uniform procedures for the administration of elections throughout all of the counties in the Commonwealth.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

(1) What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The State Board of Elections and the Commonwealth's county clerks will be impacted by this administrative regulation.

(2) Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 117.001, 117.015, 117.085, 117.086, 117.087, 117.145, 117.225, 117.228, as amended by Kentucky Acts Chapter 197, require and authorize the actions taken by this administrative regulation.

(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? It is not expected or intended that this administrative regulation will generate any revenue.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? It is not expected or intended that this administrative regulation will generate any revenue.

(c) How much will it cost to administer this program for the first year? The State Board of Elections expects that this administrative regulation amendment will cost no more to administer than is currently expended.

(d) How much will it cost to administer this program for subsequent years? The State Board of Elections expects that this administrative regulation amendment will cost no more to administer than is currently expended.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation: